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AUG 5 1968

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IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968.

No. ...**376**.

DUNBAR-STANLEY STUDIOS, INC.,
a Corporation,
Appellant,

versus

STATE OF ALABAMA,
Appellee.

**JURISDICTIONAL STATEMENT ON BEHALF
OF APPELLANT.**

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STATEMENT AS TO JURISDICTION.

In compliance with Rules 13 and 15 of the Rules of the Supreme Court of the United States, appellant submits herewith this statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the Supreme Court of Alabama entered in this cause.

I.

OPINION BELOW.

The opinion of the Supreme Court of Alabama in this case has not yet been reported officially. Unofficially, it is reported in 210 So. 2d 696. A copy of the opinion, however, is attached hereto as Appendix A.

II.

JURISDICTION.

1. Pursuant to Title 51, Code of Ala., sec. 131 (a) and (p), on May 19, 1966, the State Department of Revenue of Alabama made final an assessment against appellant, herein referred to as taxpayer, for privilege license on "transient or traveling photographer" provided in Title 51, Code of Ala., sec. 569. This assessment was appealed to the Circuit Court for the Fifteenth Judicial Circuit of Alabama (Montgomery County) in equity, in accordance with the provisions of Title 51, Code of Ala., sec. 140. After trial on the merits, wherein taxpayer insisted that the application of the "transient or traveling photographer" license to the activities of taxpayer was a discriminatory burden on interstate commerce, a decree in favor of the State was rendered on March 14, 1967. From this final decree, on March 20, 1967, an appeal was taken to the Supreme Court of Alabama under the general appeal statutes, Tit. 7, Code of Ala., sec. 754, et seq.

2. On the 13th day of May, 1968, the Supreme Court of Alabama affirmed the decree of the Circuit Court, and it is this judgment which is sought to be reviewed on this appeal, and for which a Notice of Appeal was filed with the Clerk of the Supreme Court of Alabama on the 8th day of July, 1968. No application for rehearing was filed in that Court, and its judgment is now final.

3. The statutory provision believed to confer on this Court jurisdiction of this appeal is

28 U. S. C. A., sec. 1257 (2).

4. Among the cases believed to sustain the jurisdiction of this Court in this case:

1.

State Cannot Fractionalize and Tax Link in Unbroken Chain of Interstate Activity.

Nippert v. Richmond, 327 U. S. 416, 423 (1946).

2.

Flat-Sum Privilege License on Interstate Activity Invalid.

West Point Grocery Co. v. Opelika, 354 U. S. 390 (1957).

3.

Increasing Tax Burden Because of Interstate Activity Invalid.

Leloup v. Port of Mobile, 127 U. S. 640 (1888).

See also:

Portland Cement Co. v. Minnesota, 358 U. S. 450 (1959);

Sprout v. South Bend, 277 U. S. 163, 171 (1928).

4.

State Cannot License Interstate Activity.

Crutcher v. Kentucky, 141 U. S. 47 (1891);

Spector Motor Service v. O'Connor, 340 U. S. 602 (1951).

5.

Other Jurisdictions Have Held Such Licenses Void.

Olan Mills, Inc. v. City of Tallahassee, ... Fla. ..., 100 So. 2d 164 (1958), cert. den. 359 U. S. 924.

Also see cases collected in **Haden v. Olan Mills, Inc.**, 273 Ala. 129, 135 So. 2d 388 (1961).

5. The statute applied to taxpayer's activities, and therefore whose validity is involved, is:

Title 51, Code of Ala., sec. 569:

"§ 569. Photographers and photograph galleries. Every photograph gallery, or person engaged in photography, when the business is conducted at a fixed location: In cities and towns of seventy-five thousand inhabitants and over, twenty-five dollars; in cities and towns of less than seventy-five thousand and not less than forty thousand inhabitants, fifteen dollars; in cities and towns of less than forty thousand and not less than seven thousand inhabitants, ten dollars; in cities and towns of less than seven thousand and over one thousand inhabitants, five dollars; in all other places whether incorporated or not, three dollars. The payment of the license required in this section shall authorize the doing of business only in the town, city or county where paid. For each transient or traveling photographer, five dollars per week."

III.

QUESTIONS PRESENTED.

Taxpayer is engaged in the business of soliciting orders for and taking baby pictures throughout the country, out of Charlotte, North Carolina, operating in and using the facilities of a nation-wide chain of moderate priced department stores (J. C. Penney Company). The City of Mobile, Alabama, sought to impose a discriminatory privilege license tax on these activities (as more fully appears in the related case, *Dunbar-Stanley Studios, Inc. v. City of Mobile*, which is appealed with this case) and then the State of Alabama sought to impose the license tax quoted above on these same activities. The questions presented in this case are:

(1) whether or not these activities in interstate commerce are subject to this flat, fixed sum, unapportioned admission privilege license tax as a condition precedent to the performance thereof in the State of Alabama;

(2) whether or not the unbroken chain of interstate activities here involved may be fractionalized into parts on which state licenses may be imposed; and

(3) whether or not the applicability of a weekly rather than an annual license increasing the amount exacted can be made dependent upon interstate activity?

IV.

STATEMENT OF THE CASE.

Taxpayer has operated openly through the J. C. Penney Company stores in eight cities in Alabama since 1963 without hindrance from the State of Alabama, and without being assessed any privilege license by the State Department of Revenue or anyone else under the statute quoted above. In 1963, the City of Mobile demanded of taxpayer and was paid a city license imposed on "itinerant photographers." Since taxpayer was and is not an "itinerant photographer", this was refunded, but under an agreement made with the City that J. C. Penney Company obtain a City "local photographer's" license. J. C. Penney Company took out this license and continued to do so through the year here involved. On August 31, 1965, without prior notice to taxpayer or J. C. Penney, the City levied a license of \$50.00 a day on some photographers, which was sought to be imposed on taxpayer and employees of J. C. Penney Company, with criminal sanctions. Taxpayer sought an injunction and Declaratory Judgment in the State Court to test the validity of this City License, all as appears more fully in the related case of

Dunbar-Stanley Studios, Inc. v. City of Mobile, appealed herewith to this Court.

Thereafter, on May 19, 1966, the State Department of Revenue assessed the privilege license quoted above against taxpayer for the operations in Mobile and seven other Cities in Alabama, not only for the current license, but for licenses for prior years as escapes for as many years as the statutes of Alabama would permit. From this assessment, an appeal to the circuit court was taken.

From the pleadings and oral testimony taken in open court it was developed that taxpayer was engaged in the photography business in Charlotte, North Carolina, specializing in photography of children. It had no office, inventory, developing laboratory or agent in Alabama. J. C. Penney Company was a department store which entered into an agreement for taxpayer to engage in taxpayer's photography work in the Penney stores, some of which were in Alabama. The dates of visits by taxpayer's photographers were fixed by the local Penney store managers. Newspaper advertisements were run by Penney, but its cost was deducted from the gross receipts. Taxpayer prepared postal cards notifying its customers of the visits, which were mailed out by Penney.

Taxpayer's photographers then came into Alabama, solicited orders for pictures, took pictures, returned the exposed film to Charlotte, with the customer's orders for pictures, and if the orders were accepted, the pictures were developed, printed and finished. The finished pictures were returned to the Penney stores where they had been taken, and they were paid for and picked up by the customer. The payments were made to the Penney employees only, and not to taxpayer's photographers or agents.

Penney retained 12½% of the receipts as its commission, and after deducting expenses, remitted the balance to taxpayer. Penney did no photography work in Ala-

bama. This was done by taxpayer on Penney's premises, though subject to Penney's store rules as to hours, time, place, etc., of taking the pictures.

This was single-visit photography, as distinguished from three-stage photography engaged in by Olan Mills as shown in *Haden v. Olan Mills, Inc.*, 273 Ala. 129, 135 So. 2d 388 (1961).

Before the State Department of Revenue, taxpayer raised the point that taxpayer was engaged in the solicitation of orders for baby pictures and the subsequent delivery of the pictures at the end of an uninterrupted movement in interstate commerce and the imposition of this flat, fixed sum, unapportioned admission privilege license was in violation of the Commerce Clause of the Federal Constitution. The State Department of Revenue overruled this objection and made final the assessment.

In the Circuit Court, in the pleadings filed by taxpayer, it was specifically alleged in Paragraph 4 of the Bill of Complaint:

"4. During all time here pertinent, Appellant has been and is now engaged exclusively in interstate commerce, for which it is not now liable to Appellee for the licenses claimed here or for any other license, in this: * * *"

In the Prayer for Relief, it was alleged:

"Wherefore, Premises Considered, Appellant prays that upon final hearing hereof that this Court hold:

1. That Appellant is not liable for the license imposed by said assessment,

2. That Appellant is engaged in interstate commerce,

3. That imposition of said license to the activities of Appellant violates the provisions of the Federal Constitution, including the commerce clause."

The trial court expressly passed on these issues, providing in its Decree:

"1. That the Appellant is liable for the tax imposed.

2. That the imposition of the tax in the instant case is not violative of any provisions of the Federal Constitution as viewed by the Supreme Court of Alabama."

From this Decree, there was an appeal to the Supreme Court of Alabama. The Assignment of Errors in that Court contains as grounds, among others:

"1. The trial court erred in holding that the imposition of the privilege license imposed by Title 51, Code of Ala., Sec. 569, on Appellant is not a violation of any provision of the Federal Constitution (Tr. 69).

2. The trial court erred in holding that Appellant is liable for the privilege license imposed by Title 51, Code of Ala., Sec. 569" (Tr. 69).

The Supreme Court of Alabama spoke directly to this contention of taxpayer, saying:

"The contention of appellant is that it was operating through the channels of interstate commerce, and was exempt under Article 1, Section 8, Constitution of the United States, which empowers Congress to regulate commerce among the several states."

The Supreme Court cited and quoted from two Alabama cases, namely, *Graves v. State*, 258 Ala. 359, 62 So. 2d 446 (1953), and *Haden v. Olan Mills, Inc.*, 273 Ala. 129, 135 So. 2d 388 (1961) and then, in our judgment, invited a review by this Court, by saying:

"We are constrained to adhere to our pronouncements in the *Graves v. State*, *supra*, and *Haden v.*

Olan Mills, Inc., supra, cases until the Supreme Court of the United States has expressed itself on the factual situation before us.

"We hold that the license tax required of transient or traveling photographers by Section 569, *supra*, should be collected from appellant, because of its so-called traveling operation in this State, until the Supreme Court of the United States holds to the contrary. The license tax is upon a local activity and does not infringe on or constitute a burden on interstate commerce."

V.

THE QUESTIONS ARE SUBSTANTIAL

At its place of business in Charlotte, North Carolina, taxpayer originated a specialty in taking 5×7 baby pictures at .59¢ each. The specialty developed into a nationwide business in conjunction with the J. C. Penney Company Department stores. Its business is interstate in its nature and scope. It is now doing business in 47 of the 50 states, and even in foreign countries. It is now and always has collected and remitted local sales taxes where applicable. But Alabama is now standing in the door to exact a flat, fixed sum, unapportioned admission privilege license before taxpayer can engage in this interstate activity in Alabama. Furthermore, Alabama is seeking to impose this license on taxpayer for every county in the State where it operates, and for each week taxpayer so operates, though privilege licenses on local photographers are only annual.

The Photographer's license is on those engaged in photography

- (1) "at a fixed location", and
- (2) as a "transient or traveling photographer."

It is apparent that taxpayer operated at fixed locations throughout the State,—in J. C. Penney stores. The State Department of Revenue took the position that taxpayer was a "transient or traveling photographer" and the courts affirmed this.

The business of photography, as most businesses, has many parts. The privilege license seems to apply only to the whole. But suppose one only developed film in Alabama, but did nothing else in Alabama in connection with photography. Could it be said that he was in the photography business in Alabama? The same question can be asked for the other parts of the photography business. So, in the case at bar, taxpayer only solicits orders and exposes film in Alabama. Is this engaging in the photography business in Alabama? The Supreme Court of Alabama held that it was.

This is explained by the case of *Graves v. State*, 258 Ala. 359, 62 So. 2d 446 (1953), where an employee of Olan Mills, Inc., a non-resident photography concern, was prosecuted criminally for engaging in business within the State as a "transient or traveling photographer" without a license. The facts were that Olan Mills sent in two groups of employees, the first to solicit orders, and the second to expose the film and forward it to out-of-state headquarters for developing and processing. Graves exposed the film only. He had not solicited orders, or done anything else in the process. There were serious questions as to the applicability of this license on the business of photography (1) to one merely exposing films, and (2) to an agent acting within the line and scope of his employment, etc. But the Court held the license did apply in this case. The matter most discussed by the court was the validity of the license as so applied. The Supreme Court distinguished the drummer cases, saying:

"The license tax here imposed is not laid on the solicitation of orders."

If the Court had not so held, the license would not apply to Graves who did no solicitation. The Court further distinguished cases from other States where Olan Mills was held exempt from State privilege licenses under the Commerce Clause, for

"they refer to a tax on soliciting or selling goods in interstate commerce."

And this was appropriate in that case for Graves did no soliciting. But it was implied that had the tax been imposed on soliciting orders there might be a different result.

However, in *Haden v. Olan Mills, Inc.*, 273 Ala. 129, 135 So. 2d 388 (1961), the employer brought a declaratory judgment action to ascertain the constitutionality of this license as applied to its operations in Alabama by three different types employees, first those coming to town to solicit orders, second, the one exposing film (As Graves), and third, those bringing back proofs from which customers could select the one to be finished. Contrary to the facts in the Graves case, solicitation was involved in this case, plus the sending in the proof-selector. Notwithstanding this, the Supreme Court of Alabama said:

"The facts here are in all material respects the same as those presented in the case of *Graves v. State* . . . in so far as they relate to the so-called road or traveling operation."

Even more incomprehensible is the additional statement:

"We refused to apply the rule of the 'drummer cases' [in *Graves*] reaffirmed in *Nippert v. City of Richmond* . . . because Olan Mills, Inc., in carrying on its transient operation in this state did much more than solicit business within this State."

This is a misstatement. Graves did not do more than solicit. He did no soliciting. He exposed film only.

Nippert did involve solicitation. But **Graves** did not solicit. Hence, presumably, in **Graves** the Alabama court thought **Nippert** inapplicable. But as hereinafter set out, this overlooks the holding in **Nippert** that interstate activity cannot be fractionalized into parts, such as solicitation, and taxed as a local activity.

The Court in **Haden** then held that in **Graves**:

"the conduct of the photographer in this state is a separate and distinct incident upon which the license tax falls."

This statement is also misleading because **Graves** only exposed film in the State. If he were subject to the license, it had to be because the license was on exposing film. To say that the license ONLY covered exposing film is a non sequitur.

The Court then held in **Haden** that since **Olan Mills** exposed film in the State, this was subject to the Photographer's License, and it was all that was subject to the tax. Therefore, the mere fact that **Olan Mills** also solicited orders was irrelevant, for the tax did not reach that.

Finally, the Court held that even though **Olan Mills** had fixed places where the film was exposed, since the film went out of the State, the applicable license was the one on "transient or traveling photographers", and not for engaging in photography "at a fixed location."

Besides being a peculiar way to construe a statute, these cases present in bold relief the right of a State to fractionalize an interstate activity and impose a privilege license on one essential part of the activity, and thereby evade the cases prohibiting a flat-sum privilege license on an interstate enterprise whose only contact is the solicitation of orders and the subsequent delivery of goods at the end of an uninterrupted movement in interstate commerce. **West Point Grocery Co. v. Opelika**, 354 U. S. 391 (1957).

So, an annual license on a business at a fixed location and a weekly license on transients for the weeks the transient operates is understandable. But to make a business at a fixed location pay a weekly license reserved for transients is not so clear. When the Supreme Court of Alabama says in the *Haden* case that it makes this difference in treatment between businesses operated at a fixed location because one of them

"sends its films back to Chattanooga to be processed and pictures are ultimately made in Chattanooga"

then we have the imposition of a different type license (weekly) because of interstate activity. Insofar as we know, this has never been countenanced.

These questions are so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution.

1.

The Right of a State to Fractionalize Interstate Activity and License Essential Components Should Be Finally Determined by This Court in This Case.

(1) The decision of the Supreme Court of Alabama on this question is probably wrongly decided.

In *Nippert v. Richmond*, 327 U. S. 416, 423 (1946) this Court said:

"If the only thing necessary to sustain a state tax bearing upon interstate commerce were to discover some local incident which might be regarded as separate and distinct from 'the transportation or intercourse which is' the commerce itself and then to lay the tax on that incident, all interstate commerce could be subjected to state taxation and without regard to the substantial economic effects of the

tax upon the commerce. For the situation is difficult to think of in which some incident of an interstate transaction taking place within a state could not be segregated by an act of mental gymnastics and made the fulcrum of the tax. All interstate commerce takes place within the confines of the states and necessarily involves incidents occurring within each state through which it passes or with which it is connected in fact. And there is no known limit to the mind's capacity to carve out from what is an entire or integral economic process particular phases or incidents, label them 'separate and distinct' or 'local', and thus achieve its desired result.

It has not yet been decided that every state tax bearing upon or affecting commerce becomes valid, if only some conceivably or conveniently separable 'local incident' may be found and made the focus of the tax."

See also:

Freeman v. Hewit, 329 U. S. 249, 267, 271 (1947);
Memphis Steam Laundry v. Stone, 342 U. S. 389, 392 (1952);

Railway Express Agency v. Virginia, 347 U. S. 359, 367, 368 (1954).

These cases hold that the States cannot segregate solicitation from the interstate activity and evade the Commerce Clause by licensing the solicitation. The rationale of these cases, and the quoted language, would prohibit Alabama from segregating exposing film in the photography business and thereby evade the Commerce Clause protection of interstate commercial activity. Hence, the holding in the case at bar that Alabama can license exposing film in Alabama (an essential part of the photography business) and that this will evade the limitations of the Commerce Clause on state taxation of inter-

state activity is contrary to the holdings of this Court noted above.

(2) The question should be finally determined.

Alabama is committed to the doctrine that the Legislature may fractionalize interstate activity and license the local portion thereof. In addition to the cases noted above,

See **Family Discount Stamp Co. v. State**, 274 Ala. 322, 325, 148 So. 2d 218 (1962).

It cannot be denied that there is language in some cases in this Court involving other taxes and other licenses which might be thought to sustain the position of the Alabama courts in this case. Thus in a case involving a franchise tax on a foreign corporation operating a pipeline, the right of the State to tax "local incidents" is set out in

Memphis Natural Gas v. Stone, 335 U. S. 80, 86, 87 (1948).

So with reference to a gross receipts tax on wholesalers.

General Motors v. Washington, 377 U. S. 423, 447 (1964).

A license graduated on a percentage of the business done was involved in

Alaska v. Arctic Maid, 366 U. S. 199, 203, 204 (1961).

In 15 C. J. S. 785, Commerce, Sec. 111 (2), it is positively stated:

"* * * intra-state events or local activities in connection with interstate commerce will permit the imposition of a state or local license or privilege tax."

None of these involve an admission privilege license, but the right of a state to fractionalize interstate activity and

tax the non-interstate portions of it has been thought to exist. These matters should be answered, and only this Court can do so, and this case should be the place where it is concluded.

2.

The Right of a State to Impose a Flat-Sum Privilege License on an Essential Element of an Interstate Activity Has Probably Been Wrongly Decided by the Supreme Court of Alabama in This Case.

In *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U. S. 33, 45 (1940), this Court said:

"Fixed-sum license fees regardless of the amount, for the privilege of carrying on the commerce, have been thought likely to be used to overburden the interstate commerce."

This is precisely the effect of the license in the case at bar.

In *West Point Grocery Co. v. Opelika*, 354 U. S. 390, 391 (1957) this Court said:

"We held in *Nippert v. Richmond*, 327 U. S. 416, and in *Memphis Steam Laundry Cleaner, Inc. v. Stone*, 342 U. S. 389, that a municipality may not impose a flat-sum privilege tax on an interstate enterprise whose only contact with the municipality is the solicitation of orders and the subsequent delivery of goods at the end of an uninterrupted movement in interstate commerce, such a tax having a substantial exclusory effect on interstate commerce."

Hence, had the Supreme Court of Alabama held that this license applied to the solicitation of orders for photographs, this holding would have been clearly contrary to the cases noted.

However, that Court held this license applicable only to the exposure of film. But, the exposure of film, though occurring in Alabama, was as essential to the business of photography as was solicitation of orders for photographs. See *Nippert v. Richmond*, 327 U. S. 416, 423 (1946).

If a flat-sum privilege license on solicitation of an interstate activity is invalid under the Commerce Clause, so such a license on exposing film should be invalid.

8.

The Right of a State to Classify Businesses According to Interstate Activity and Impose a Greater Burden on Those Engaged in Interstate Activity Than on Other Businesses Violates the Commerce Clause.

The annual state photographer's license on those engaged in business "at a fixed location" in the cities where taxpayer operates is:

Andalusia	\$10.00
Anniston	10.00
Birmingham	25.00
Decatur	10.00
Dothan	10.00
Jasper	10.00
Prichard	15.00
Mobile	25.00

Because taxpayer sends its film back to North Carolina to be processed (see *Haden v. Olan Mills, Inc.*, 273 Ala. 129, 132, 135 So. 2d 388) this license becomes \$5.00 for each week taxpayer operates in these cities, even though the business is engaged in "at a fixed location." Hence, Alabama imposes a higher tax on taxpayer because of its interstate activity than it does on taxpayer's competitors who are not engaged in interstate activity.

The right of a State to classify businesses according to interstate activity, and exclude those engaged in interstate activity may be permissible.

See *Singer Sewing Machine Co. v. Brickell*, 233 U. S. 304, 313 (1914).

The converse, however, is not true. To classify the businesses and then impose a different and higher tax on those engaged in interstate activity is clearly bad. This is the doctrine of *West Point Grocery Co. v. Opelika*, 354 Ala. 390 (1957), and the cases cited there. It is also set out in *Portland Cement Co. v. Minnesota*, 358 U. S. 450, 458 (1959), *Sprout v. South Bend*, 277 U. S. 163, 171 (1928), and the other cases set out in the Jurisdictional Statement in *Dunbar-Stanley Studios v. Mobile*, filed herewith.

In fact, it is on this very point that an earlier case from Mobile was overruled by this Court. In *Osborne v. Mobile*, 16 Wall. 479 (1878), the city imposed a license on express companies doing business in the city only of \$50.00, in the State \$100.00, outside the State, \$500.00. The classification was held not to violate the Commerce Clause. However in *Leloup v. Port of Mobile*, 127 U. S. 640, 643 (1888), the *Osborne* case was overruled on the ground that "no state has the right to lay a tax on interstate commerce in any form . . . on the occupation or business of carrying it on, and the reason is that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress."

Therefore, this Court has held that a case sustaining a classification based on interstate activity is no longer valid. Since the City is again doing the same thing, this case should be reviewed, and this effort should also be thwarted by this Court.

Interstate Commerce Cannot Be Licensed by the States.

The Supreme Court of Alabama has applied the transient photographer's license to taxpayer because of interstate activity, which makes the case one of discriminatory treatment of interstate activity. But this is not necessary to strike down this license. The point is that in this case it is applied directly to interstate activity.

A license applying non-discriminatorily to interstate and intrastate commerce is nevertheless invalid insofar as it is applied to the interstate commerce, and the mere fact that the license applies equally in both cases does not save it. The invalidity of licenses under the Commerce Clause on interstate commerce was established in the case of *Leloup v. Port of Mobile*, 127 U. S. 640, 648 (1888). And this was true "even though the same amount of tax should be laid on domestic commerce," *Robbins v. Taxing District*, 120 U. S. 489, 497 (1887).

This has been followed:

Crutcher v. Kentucky, 141 U. S. 47, 58 (1891);

Barrett v. New York, 232 U. S. 14, 31 (1914);

Spector Motor Service v. O'Connor, 340 U. S. 602, 608, 609 (1951);

Memphis Steam Laundry v. Stone, 342 U. S. 389, 392, 393 (1952).

Since the State has licensed interstate activity in this case, this Court should review it and reverse it.

The Overwhelming Weight of Authorities Hold That Such Privilege Licenses as Are Here Involved Are in Violation of the Commerce Clause.

Almost every state court which has considered the validity of a local licensing or privilege tax on similar activities by photographers has held that such license on a business exclusively interstate in character is invalid as violating the commerce clause of the United States Constitution. The basis for the state court decisions striking down local privilege license taxes as applied to photographers is amply summarized by the court in *Olan Mills, Inc. v. City of Tallahassee*, 100 So. 2d 164 (Fla. 1958), Cert. Denied, 359 U. S. 924, a case involving a license tax of \$25.00 per year, the same rate applying to both resident and non-resident photographers, wherein the court stated:

"Since the *Nippert* case was decided the Supreme Court of the United States has squarely held that any direct tax upon the privilege of carrying on a business exclusively interstate in character is invalid as violating the commerce clause and that this is true no matter how fairly the tax is apportioned to business done within the state. *Spector Motor Service, Inc. v. O'Connor*, 340 U. S. 602, 71 S. Ct. 508, 95 L. ed. 573. The same rule was adhered to in the recent case of *Railway Express Agency, Inc. v. Commonwealth of Virginia*, 347 U. S. 359, 74 S. Ct. 558, 98 L. ed. 757."

See also:

Nicholson v. Forrest City, 216 Ark. 808, 228 S. W. 2d 53 (Ark. 1950). (License tax applied equally to local and out of state photographers—held constitutes an undue burden on interstate commerce);

Graves v. City of Gainesville, 78 Ga. App. 186, 51 S. E. 2d 58 (1953). (\$15.00 per year tax on resident photographers and \$10.00 per day on all itinerant photographers—held undue burden on interstate commerce);

Commonwealth v. Olan Mills, Inc., 196 Va. 898, 86 S. E. 2d 27 (1955). (Tax applied equally to local and out of state photographers—held the exposing of the film by a photographer an integral part of interstate commerce and tax an undue burden thereon);

Olan Mills, Inc. v. Town of Kingtree, 236 S. C. 535, 115 S. E. 2d 52 (1960);

Bossert v. City of Okmulgee, 97 Okla. Crim. 140, 260 P. 2d 429 (1953).

Additional cases are discussed and summarized in an annotation "Regulation of Practice of Photography" appearing in 7 A. L. R. 2d 416 (1949). See also Later Case Service.

The taxpayers' actual operation as is involved herein was expressly held to be interstate in character in **Dunbar Stanley Studios v. Victor C. Breen, et al.**, a three judge district court decision for the United States District Court for the District of New Mexico filed in Albuquerque on September 22, 1964. This case has not been reported, either officially or unofficially. A copy of the opinion, however, is attached hereto as Appendix C. In this case the three judge federal court held that a New Mexico licensing statute which required Dunbar-Stanley Studios to pay a license tax or charge of \$350.00 per year constituted an undue burden on interstate commerce.

Alabama stands virtually alone in upholding privilege licenses as are here involved and in separating for purposes of local taxation the various integral links involved in the business of photography. This conflict between Alabama

courts interpretation of the power of the state and its municipalities to tax the interstate activities of photographers and the interpretation by courts of the other states, and the United States Supreme Court, should be resolved. The Alabama court has invited it in this case. We invite it. We suggest that unless this court does answer in this case, the conflict will continue indefinitely. We urge this court to review this question in this case and resolve these conflicts,

6.

A Copy of the Opinion Delivered Upon the Rendering of the Judgment Sought to Be Reviewed Is Attached Hereto as Exhibit A.

7.

A Copy of the Order of the Supreme Court of Alabama Appealed From Is Attached Hereto as Exhibit B.

Respectfully submitted,

J. EDWARD THORNTON,

P. O. Box 23,

Mobile, Alabama 36601,

Attorney for Appellant Upon Whom
Service Is to Be Had.

Of Counsel:

GLEN B. HARDYMON,

KENNEDY, COVINGTON, LOBDELL &
HICKMAN,

THORNTON and McGOWIN.

Certificate of Service.

I, J. Edward Thornton, an attorney and member of the Bar of this Court, one of the attorneys of record for Dunbar-Stanley Studios, Inc., a corporation, Appellant herein, certify that I served a copy of the foregoing Jurisdictional Statement on Hon. William H. Burton, Attorney for the State of Alabama, Appellee herein, by depositing the same in a United States mail box, with first class postage prepaid, addressed to him as counsel of record at his post office address on the 5th day of August, 1968.

J. Edward Thornton,
Attorney.